No. 11382

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM SHUBIN, FREDERICK ALEXANDER SHUBIN and JACK L. KISSEL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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APPELLANTS' OPENING BRIEF.

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TOPICAL INDEX

PAGE

STATUTES.

TEXTBOOKS

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Statement of Pleadings and Facts.

The indictment in this case was filed in the Southern District of California, Central Division, on March 11, 1946. It charged the three appealing defendants in Count 1 with violating Section 88 of Title 18, U. S. C. A., that is, with a conspiracy to violate the provisions of the Emergency Price Control Act of 1942 (Sections 901 *et seq.* of Title 50, U. S. C. A.). The remaining thirty-nine counts charged specific violations of this Act in that the three defendants were accused of making sales of wholesale cuts of meat in excess of ceiling prices and with failing to keep accurate records of their sales as required by the regulations of the Office of Price Administration.

Prior to submission of the case to the jury, the government dismissed Counts 12, 13, 14, 15, 19, 26, 27, 28, 29,

34, 35, 36, 37, 38, 39 and 40, leaving the remaining twenty-four counts for submission to the jury. The jury returned verdicts of guilty against William Shubin and Jack L. Kissel on all of these counts. As to Frederick A. Shubin, it returned a verdict of guilty on Counts 1, 16, 17, 18, 20, 21 and 22, and of not guilty as to all the remaining counts. He was found guilty only on the conspiracy count and on the counts charging the keeping of incorrect records as to sales, and was not found guilty on counts charging sales at over-ceiling prices.

The District Court imposed fines and jail sentences on William Shubin and Jack L. Kissel each of $5,000.00 on the conspiracy count and $1,000.00 as to each of the remaining counts on which they were found guilty. [R. 56-63.] The aggregate fines imposed on those two defendants was therefore $28,000.00 each. The court also imposed a sentence of imprisonment of one year in the county jail on the conspiracy count, and of six months in the county jail on each of the other twenty-three counts with the direction that the jail sentences run concurrently.

The court fined Frederick A. Shubin $2500.00 on the conspiracy count and $500.00 on each of the remaining six counts as to which he was found guilty. He was given a six-month jail sentence on Count 1, and a three-month jail sentence on each of the other six counts, with the provision that all such sentences run concurrently. [R. 59-61.]

The collective fines imposed on these three defendants total $61,500.00. in addition to the time which they must spend in prison.

The jurisdiction of the District Court over the offenses charged is sustained by Section 546 of Title 18, U. S. C. A., and by Section 41 (2) of Title 28 of U. S. C. A., as to the conspiracy and other counts. In addition, Sec-

tion 925 (c) of Title 50 of U. S. C. A. expressly confers jurisdiction on such court for violation of the criminal statutes relating to the Emergency Price Control Act of 1942.

Jurisdiction of this court to determine this appeal is conferred by Section 225 of Title 28, U. S. C. A.

Count 1 of the indictment charged that the three appellants since November of 1942 and continuously thereafter have conspired to refuse to sell meat except for prices in excess of those permitted under the Emergency Price Control Act and in the Maximum Price Regulations Numbers 148, 169 and 239. It also charged such a conspiracy to sell meat in excess of maximum prices permitted by such statute and regulations, and a conspiracy to make false and fictitious entries upon the appellants' records in connection with sales of meat in violation of such act and regulations. [R. 3-8.] That count charges a series of overt acts which will be hereinafter discussed in connection with the argument as to the insufficiency of the evidence on this count.

The remaining counts involved on this appeal charge sales by the appellants of wholesale cuts of meat over ceiling and the maintenance of false records relating to such sales. [R. 9-29.] It is not necessary to deal with the pleadings in each of these counts separately as they all fall into the same pattern. Collectively they involve sales to three purchasers and the counts pertaining to false invoices also relate to sales made to one or the other of those three purchasers between the dates of January 4, 1944, and November 15, 1945.

The following summary sets forth the basic elements of each count:

Count Number	Government's Exhibit No.	Invoice Price	Name of Purchaser	Offense Charged
2	5	$ 74.08	Dvorak	Sale over ceiling
3	6	53.82	Dvorak	Sale over ceiling
4	7	76.58	Dvorak	Sale over ceiling
5	8	111.27	Dvorak	Sale over ceiling
6	9	66.66	Dvorak	Sale over ceiling
7	10	246.40	Dvorak	Sale over ceiling
8	11	45.50	Dvorak	Sale over ceiling
9	12	121.77	Dvorak	Sale over ceiling
10	34	152.57	Snider	Sale over ceiling
11	25	36.96	Veuhoff	Sale over ceiling
16	13	247.26	Dvorak	False invoice
17	14	89.10	Dvorak	False invoice
18	15	169.35	Dvorak	False invoice
20	16	319.89	Dvorak	False invoice
21	17	184.95	Dvorak	False invoice
22	18	453.17	Dvorak	False invoice
23	32	124.80	Snider	Sale over ceiling
24	31	55.04	Snider	Sale over ceiling
25	33	126.42	Snider	Sale over ceiling
30	26	199.01	Veuhoff	Sale over ceiling
31	27	153.28	Veuhoff	Sale over ceiling
32	28	177.64	Veuhoff	Sale over ceiling
33	29	124.10	Veuhoff	Sale over ceiling
	Total	$3,409.62		

The only evidence specifically directed to proving alleged overcharges with respect to the above mentioned counts was testimony given by the three above mentioned purchasers, each of whose testimony was restricted to the transactions in which he had been involved. The Government's Exhibit number listed above relates in each instance to an invoice relating to the sale involved, and it was stipulated that the prices shown on the invoices were the

ceiling prices. Passing for the time being the insufficiency of the testimony of the above three witnesses because of their uncertainty as to whom they made the overpayments, it should be noted that the total overcharges shown by the testimony of these witnesses aggregate approximately $500.00. This is an approximation computed by us from the testimony of these three witnesses as to their over-ceiling payments.

Three invoices were received in connection with proof of overt acts as charged in the conspiracy count, sub-paragraphs (r), (s) and (t). These were Exhibits 20, 21 and 22, all of which the government claims to be false invoices issued by the defendants to the witness Dvorak in connection with sales of meat. The aggregate invoice price of these three invoices is $302.19, and the government witness Dvorak testified that the overcharges on these three transactions were $40.51.

Brief Statement of Questions Involved.

The questions to be presented on this appeal involve:

1. Error in the admission of prejudicial evidence;

2. Error in refusing to receive evidence;

3. Error in refusing instructions requested by appellants;

4. Insufficiency of the evidence to sustain the verdict and judgment; and

5. Excessiveness of the fines and sentences.

The first four of these general questions overlap in some instances in that the same question of law may be involved. On the other hand, the grounds of the error vary in that several propositions of law are involved under each of those four general questions above set

forth. We will endeavor to group the errors for treatment according to the question of law involved.

We will not devote any separate subdivision to the excessiveness of the punishment. We realize that this is a matter generally within the province of the trial court, but we know of no case in this District wherein such severe penalties have been imposed for offenses of this type involving persons having no prior criminal record.

The conviction was obtained wholly on inadmissible evidence, and if such evidence had been excluded, there would have been insufficient evidence to warrant the submission of the case to the jury.

The questions will be dealt with in the following order:

1. The District Court erred in overruling objections of appellants to testimony of witnesses wherein the witnesses could not designate with which of the three appellants he had the transaction involved, but stated that it was one or the other of the defendants. It also failed to properly instruct the jury on the liability of one copartner for the acts of another partner.

2. The District Court erred in admitting testimony in the form of opinions and estimates as to the amount per pound which such witnesses paid in excess of ceiling and as to the number of times that such witnesses paid in excess of ceiling.

3. The issue of good faith was not properly presented to the jury.

4. The District Court erred in receiving in evidence and in denying defendants' motion to strike testimony of witnesses from the Bureau of Internal Revenue on each of the following grounds:

(a) The testimony given by those witnesses was from information obtained in the course of their official duties and was privileged and confidential and its disclosure constituted a violation of appellants' constitutional rights under the Fourth and Fifth Amendments.

(b) The testimony of those witnesses was from information obtained by them in the course of their official duties and the respondent did not lawfully obtain permission of the Commissioner of Internal Revenue to use the information which such witnesses had, in that there was no compliance with the laws and regulations relating to the obtaining or use of such information.

(c) Such witnesses, in testifying, admittedly refreshed their recollection from documents which the trial court held had not been lawfully obtained from the Commissioner of Internal Revenue, and which documents the court refused to admit into evidence for that reason. The trial court, nevertheless, erroneously permitted the use of such documents by the above three witnesses to refresh their recollection and to enable them to testify at the trial.

5. The District Court refused to admit supplemental income tax returns of the individual appellants on the ground that they had not been obtained from the Internal Revenue Department in compliance with the laws and rules and regulations relating to the use of income tax returns as evidence. Such court, nevertheless, erred in refusing to permit appellants' counsel to inquire into the extent to which such returns were used before the Grand Jury in obtaining the indictment after defendants' counsel had made a motion to quash the indictment.

6. As to appellants William Shubin and Frederick A. Shubin, the District Court erred in admitting into evidence an accountant's statement prepared under the supervision of appellants' tax attorney and delivered by such attorney to agents of the Department of Internal Revenue, there being no showing that said two appellants ever waived the privilege accorded to them under subsection 2 of Section 1881 of the Code of Civil Procedure of the State of California.

7. There was no evidence tending to show the existence of a conspiracy other than admissions made by the three appellants to the agents of the Bureau of Internal Revenue in connection with the preparation of supplemental income tax returns, and such admissions are insufficient to prove a conspiracy as they were not made in furtherance of any conspiracy, nor were they made by appellants in the presence of one another.

ARGUMENT.

POINT ONE.

The District Court Erred in Overruling Objections of Appellants to Testimony of Witnesses Wherein the Witnesses Could Not Designate With Which of the Three Appellants He Had the Transaction Involved, but Stated That It Was One or the Other of the Defendants. It Also Failed to Properly Instruct the Jury on the Liability of One Copartner for the Acts of Another Partner.

Emile Dvorak, Austin T. Snider and George Veuhoff, the only three witnesses who testified to having paid moneys in excess of ceiling to any of the defendants, were unable to designate more than a single instance where they paid these moneys to a particular one of these appellants. In that instance, after considerable vacillating, the witness Snider named Jack Kissel as the person to whom he paid the overcharge. [R. 235-238.] This testimony relates to Count 24, and if sufficient to convict Jack Kissel it is correspondingly insufficient to convict William Shubin.

In all other instances they testified: "It was either Bill or Jack," meaning William Shubin or Jack Kissel. They did not testify that it was one as distinguished from the other except in the above single instance, nor did they testify that on a single occasion both of such appellants were present at the time of such payment.

Such indefinite testimony permeates the entire record so we will quote the first instance of such testimony and refer to the portions of the record where the same answers were given in all of the other instances except the one above mentioned.

The witness Emile Dvorak, in answer to questions propounded by Mr. Neukom, the Government's counsel, testified as follows:

"Q. Did you pay to any party any additional sum for the purchase of meat reflected by this invoice?

The Court: Yes or no?

Mr. Neukom: Yes or no?

A. Yes, sir.

Q. And to whom, to your best recollection, did you pay it? A. To Bill or Jack.

Mr. McLaughlin: I move to strike that, your Honor, if he is not able to fix the party.

The Court: Counsel, that goes to the weight of the testimony. It is not as convincingly clear as if he could name specifically, but a person may answer in that way and it goes to the weight of his testimony, not to the admissibility." [R. 104-105.]

The following is an example of a similar ruling made as to Dvorak's testimony when he could not designate which one figured the overcharges:

"Q. And after you had received the invoice from the bookkeeper, what did you do about paying any other moneys? A. Well, it was figured out how much I owed them.

Mr. McLaughlin: I move to strike that.

The Court: Who figured it out?

The Witness: Either Bill or Jack.

Q. By Mr. Neukom: How did they do it? A. Just figured up what it amounted to and told me and I paid it.

Mr. McLaughlin: I move to strike because there is no statement as to who that party was in that

conversation and if you are going to have conversation he should fix the names of the parties there and who said it.

The Court: No, I think it goes to the weight of the testimony. It is not as certain as it could be if it were identified properly, but I believe it goes to the weight of it to be argued to the jury. Overruled and exception allowed. Proceed." [R. 171.]

Nearly every second page of the transcript of Dvorak's, Veuhoff's and Snider's testimony contains similar examples of such testimony. [R. 104-249.]

In no instance except the one above noted as to Veuhoff, was any witness able to testify that he had paid a specific appellant any overcharges.

That type of testimony has been held inadmissible as too uncertain on every occasion where the courts have been called upon to pass upon its admissibility. It has also been held insufficient to sustain a verdict as to either of such alternate defendants.

See

Reavis v. U. S. (C. C. A., Okla.), 93 F. (2d) 307;

People v. Woody, 45 Cal. 289;

Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49;

Rex v. Upton, 9 Ont. W. N. 74, 26 Dom. L. R. 208.

In 23 Corpus Juris Secundum the rule is stated at page 194 as follows:

"Testimony as to the identity of accused should be considered with caution; but there is no rule of law that testimony identifying a party must be subjected to the closest scrutiny. However, the identification

should be reasonably clear and unequivocal; and the identity of accused as the person who committed the crime must be established beyond a reasonable doubt."

The prejudice resulting to appellants William Shubin and Jack Kissel from such vague testimony is evidenced by the fact that they were both found guilty on all of the twenty-four counts which the government did not voluntarily dismiss. Yet, if the testimony were given a construction most favorable to the government, it could not have justified a verdict against more than one of these two defendants as to any of these counts.

The fact that none of these three witnesses ever designated Frederick Shubin as the recipient of these overpayments is the reason that he was not found guilty on any of the counts involving sales over ceiling. If the witnesses had been precise in designating whether it was "Bill or Jack," it is obvious that at least one of these two appellants would also have been exonerated on each of these counts.

This error was aggravated by the refusal of the District Court to give appellants' requested instruction No. 10, as follows:

"One partner cannot be prosecuted for a crime committed by his copartner so long as the partnership is engaged in a lawful business or enterprise, unless such partner performed the criminal act as a part of the partnership business and with the knowledge and consent of such other partner. Except as herein stated, neither the firm nor a partner is chargeable criminally with the acts of a copartner merely by reason of the partnership relation."

See

Levin v. U. S. (9th Cir.), 5 F. (2d) 598 at 603;

Pearson v. U. S. (9th Cir.), 147 F. (2d) 950 at 952;

U. S. v. Food and Grocery Bureau of So. Calif. (D. C., Cal.), 43 Fed. Supp. 966 at 971;

47 Corpus Juris 907; and

22 Corpus Juris Secundum 149 *et seq.*

POINT TWO.

The District Court Erred in Admitting Testimony in the Form of Opinions and Estimates as to the Amount per Pound Which Such Witnesses Paid in Excess of Ceiling and as to the Number of Times That Such Witnesses Paid in Excess of Ceiling.

The testimony of the witnesses Dvorak and Snider, as to the amount paid in excess of ceiling, was too speculative to be of any value.

The witness Emile Dvorak testified:

"Q. Are you in any position to recall, to your best recollection, how much more per pound, if any, you paid for each of the respective items reflected on Government's Exhibit No. 5 in evidence?

Mr. McLaughlin: Objected to as calling for a conclusion. If he does not know how much he paid totally, he certainly could not testify how much more per pound he paid, either.

The Court: Oh, no, counsel; that does not follow. That is a matter of mathematics. Overruled.

Q. By Mr. Neukom: Do you know how much, if any, you paid per pound more for the shortcuts on the date in question?

Mr. McLaughlin: The same objection, your Honor.

The Court: Yes; the same objection and the same ruling.

Mr. Neukom: The best of your recollection?

A. Well, it would be very hard for me to just say exactly how much I paid over ceiling on that one particular date, as the price varied.

Q. What is your best recollection?

Mr. McLaughlin: Your Honor, I think he has asked that and he answered it.

The Court: No. He is entitled to answer it fully, if he can.

A. Well, in 1944 I would say I was paying five cents a pound over ceiling for shortcut pork loins.

Q. By Mr. Neukom: Now, for the New York; is that the next item? A. Yes; three cents over ceiling.

Q. And for the—what is the third item? A. The smoked boned ready to eat ham, or smoked hams, ready to eat.

Q. Do you recall how much more per pound, if any, you were paying on that date? A. Well, I paid over, but to tell you exactly how much I paid for that, I just can't remember.

Q. What is your best recollection? A. Well—

Mr. McLaughlin: The same objection.

The Court: Yes; the same ruling.

A. The prices varied, as I said before, and in the length of time that I done business with him it is

pretty hard for me to remember, as I didn't keep track of anything.

Q. By Mr. Neukom: Well, what is your recollection? A. Well, I would say I paid about 8 cents at that time.

Mr. McLaughlin: Your Honor, I move to strike the answer on the ground it is a speculation or a guess. He said, 'I would say I did,' and he has already said he had no recollection.

The Witness: Of the exact amount no.

The Court: Oh, no. That just goes to the weight of the testimony, counsel.

Mr. Neukom: Just wait for his Honor.

The Court: Of course, it is not as satisfactory as an exact amount, but a witness may testify to that extent. Proceed." [R. 107-109.]

The examination by plaintiff's attorney of the witness continued as follows:

"Q. By Mr. Neukom: Do you recall whether or not you ever paid to Jack Kissel a sum of money in addition to the invoice price of the meat that you took away? A. Yes.

Q. Have you any recollection of about how many instances in the period of over two years that you conducted business with these partners that you paid Jack Kissel? A. I do not remember.

Q. Do you have an approximation? Was it more than one time?

Mr. McLaughlin: Just a moment. Your Honor, I submit that that is too vague and indefinite. We have no way to meet it and it does not tie down to any particular count or invoice.

The Court: Well, I assume that would have to be connected up to be of any value as evidence, but it is proper for the witness to state whether it was once, twice, or ten times and then the details will have to be developed to make it of any value to the jury.

The Witness: I would say several times.

Q. By Mr. Neukom: Well, is several more than —what do you mean by several? A. Well, lots of times. I can't put my finger on how many times.

The Court: Just say once, twice, or five times. That is what counsel is asking for.

The Witness: Okay, five times.

The Court: No, I want you to tell me.

The Witness: Well, I just don't remember how many times I paid him over the ceiling.

The Court: Just the best of your recollection.

Q. By Mr. Neukom: The best of your recollection is all that we are asking for, Mr. Dvorak. A. Ten times.

The Court: All right." [R. 132-133.]

"Q. Do you recall approximately how many times you paid Mr. William Shubin in excess of the amount which was shown on the invoice for the items that you secured from his establishment?

Mr. McLaughlin: The same objection unless it is connected up, your Honor. It is immaterial and too vague.

The Court: Overruled. Proceed. Your best recollection.

The Witness: Well, a half a dozen times." [R. 134.]

The unfairness of this type of testimony is emphasized when we remember that the witness was unable on a single occasion to state whether he had paid Bill Shubin or Jack Kissel.

The witness Snider's testimony is even more vulnerable to this objection. He first could remember nothing, then after the noon recess his memory was quite good, but he admitted on cross-examination that the pencil memoranda from which he refreshed his memory were made long after the transactions involved.

This portion of his testimony is as follows:

"Q. By Mr. Neukom: Do you have a definite personal recollection of how much you paid over the invoice price per pound without looking at some writing on the invoice? A. Of this particular bill?

Q. Yes. A. I cannot say truthfully I recall.

Q. Did you make any writing upon the bill after the transaction in question that assists you in your recollection? A. This writing is writing that was placed there—

The Court: No. Listen to the question. Repeat the question, Miss Bennallack.

(Question read.)

The Court: Yes or no.

The Witness: No." [R. 235.]

At this point the noon recess intervened, following which the witness continued:

"By Mr. Neukom:

I do have a present recollection by refreshing my memory from looking at invoice, Government's Exhibit 31 for identification (offered in support of Count 24), of having purchased the pork shown on

the invoice, for which I paid $55.04, and in addition thereto I paid 8¢ per pound therefor to Jack Kissel, to the best of my recollection."

Thereupon, Plaintiff's Exhibit No. 31 for Identification was offered in evidence, and the following proceedings were had:

"Mr. McLaughlin: Before it is received, I think the record should show—I want to make an objection that it is immaterial; and further, that this is the transaction which the witness this morning said that he did not remember, and then he was asked about notations on the back of the invoice, and apparently counsel for the Government have not seen fit to ask him anything further about it at all, but his mind has been refreshed.

The Court: In evidence.

The Clerk: Government's Exhibit No. 31 in evidence.

(The witness continuing):

By Mr. Neukom:

Government's Exhibit No. 32 for Identification (offered in support of Count 23), being an invoice dated November 29, 1944, in the amount of $121.80, shows the items of meat purchased by me on that date. I paid the amount shown on the invoice, and in addition I paid to Bill Shubin or Jack Kissel 5¢ per pound over for the bellies and 8¢ per pound over on the hogs, and nothing over on the back fat."

Plaintiff's Exhibit No. 32 for Identification was thereupon received in evidence as Plaintiff's Exhibit No. 32.

"Government's Exhibit No. 33 for Identification (offered in support of Count 25), bearing invoice

No. 47882, dated February 26, 1945, in the amount of $126.42, represents the meat which I purchased on that date, and for which I paid the amount shown on the invoice, and also paid 8¢ per pound more to either Jack Kissel or Bill Shubin."

Plaintiff's Exhibit No. 33 for Identification was thereupon received in evidence as Plaintiff's Exhibit No. 33.

"Government's Exhibit No. 34 for Identification (offered in support of Count 10), bearing Invoice No. 47443, dated February 16, 1945, in the amount of $152.27, represents the meat which I purchased on that date, and for which I paid the amount shown on the invoice, and also an additional amount of 3¢ per pound to either Jack or Bill."

Plaintiff's Exhibit No. 34 for Identification was thereupon received in evidence as Plaintiff's Exhibit No. 34. [R. 235-244.]

On cross-examination the witness Snider testified as follows:

"Before the lunch hour, I was shown one of these invoices which has been received in evidence, and I could not recall the incidents which took place at the time of the purchase therein. The pencil notations on the backs of the invoices (Government's Exhibits No. 31 and No. 32) I was shown were written by me some time in the fall of 1945, when some gentlemen from the O. P. A. came to my house. The date when they came to my house might have been in the early part of 1946." [R. 245-248.] "I never had a discussion with any of the defendants regarding their not selling me any meat unless I paid them in excess of ceiling." [R. 249.]

POINT THREE.

The Issue of Defendants' Good Faith Was Not Properly Presented to the Jury.

The appellants should not have been subjected to the severe penalties imposed by the trial court on testimony as nebulous as that of the witnesses Dvorak and Snider. While we contend that such testimony alone was sufficient to deprive appellants of a fair trial, it was only a part of the prejudice that they suffered at the trial.

Neither the witnesses Dvorak nor Snider could designate a single instance where they had been asked or required to pay a cent in excess of ceiling by any of the appellants. Veuhoff did testify that William Shubin would add the amount of the overcharge on the adding machine and give him the total amount of the overcharge, but this testimony was not tied down to any particular count. [R. 205.] In no instance was this witness able to positively testify whether he paid the overcharge to William Shubin or Jack Kissel as to any of the five counts involving him.

The witness Snider, on cross-examination, positively denied that he had ever been requested to pay over ceiling. His testimony is as follows:

> "Q. Did you have a discussion with any of the defendants regarding their not selling you any meat unless you paid in excess of ceiling?
>
> The Witness: Repeat that, please.
>
> The Court: Mr. Reporter?
>
> (Question read by the reporter.)
>
> A. No; I didn't." [R. 249.]

The witness Dvorak was not as direct, but his cross-examination shows not a single instance where he was told to pay over ceiling.

His testimony on direct examination left a possible inference that he might have been so told, so he was cross-examined on this at length. This cross-examination showed that he had never been so requested by any of the appellants. [R. 184-190.] We refrain from quoting testimony only because of the limitations on the length of this brief, as it shows how difficult it was to tie the witness down to an answer to such a simple question.

Undoubtedly the shortage of commodities and services have stimulated the practice of tipping and similar gratuities. Regardless of the undesirability of the extension of this tipping practice, it is not a violation of the O. P. A. as long as it was not extracted as a condition to the sale. In this connection, it should be noted that the witness Dvorak testified that he paid appellants over ceiling at times when meat was plentiful and easily available in Los Angeles. If he was being required to pay over ceiling, it is inconceivable that he would have continued to buy from appellants at times when he could have bought competitively elsewhere.

The substance of his testimony on cross-examination in this connection is as follows:

> "Frequently, during the war, the lockers and the refrigerators of the meat plants in Los Angeles were filled with meat, and the only obstacle to purchasing meats was lack of red points. In the instances where I paid over ceiling for meat I also paid the regular

amount of red points. When there were excess supplies of meat on hand, I was not solicited by the packing houses or wholesalers to purchase meats, but I continued to pay over ceiling for the meats that I purchased." [R. 190-191.]

If the appellants did not request or require the payment of over ceiling prices, they were at least entitled to an instruction on the issue of their good faith. There is nothing in the law or regulations which prevents a seller from receiving a gratuity so long as it is not expressly or impliedly made a condition to the sale.

Before alluding to the refused instructions on good faith, it should be noted that the government not only failed to prove that appellants had knowledge of the regulations, but it also failed to prove the terms of any of the regulations. All of these circumstances are relevant on the issue of good faith as to which each of the following instructions requested by appellants was refused:

"A contrivance or device to evade provisions of an Office of Price Administration regulation may be unlawful; yet, if the defendant in good faith conscientiously believes that he was not violating the law in anything that he did or failed to do, as shown by the evidence, then he is not guilty of wilfully violating such regulation. This is true, notwithstanding that his act or omission may as a matter of law constitute an evasion of the provisions of a regulation." [R. 40.]

"Before rendering a verdict against any defendant, you must be satisfied beyond a reasonable doubt that such defendant or defendants had knowledge of the

provision of the regulation violated, and that such defendant or defendants nevertheless intentionally violated such regulation by committing an act contrary thereto." [R. 41.]

"If any purchaser purchasing meat products from the defendants or any of them was not requested or required by the defendants to pay a price in excess of the ceiling price fixed by such regulations, but nevertheless did leave with the defendants or any of them moneys in excess of the ceiling price, that does not constitute a violation of the regulations or the law involved, and if you should find that any of the counts in this indictment involve any such transaction or transactions with respect to a purchaser, then you shall find for the defendants." [R. 42.]

"If any purchaser purchasing meat products from the defendants or any of them was not requested or required by the defendants to pay a price in excess of the ceiling price fixed by such regulations, but nevertheless did leave with the defendants or any of them moneys in excess of the ceiling price, it is for you to determine whether such additional moneys were given to the defendant or defendants by way of gratuity or as further consideration for the purchase of the meat." [R. 43.]

The above instructions on good faith were approved in *United States v. Steiner* (Cir. Ct., 7th Cir., 1945), 152 F. (2d) 484, where defendants were indicted for violating the Emergency Price Control Act in that they, as auctioneers, sold agricultural implements in excess of ceiling. The evidence showed that they had executed documents designated as leases of the equipment in order to circumvent the provisions relating to sales.

In discussing the elements of wilfulness and knowledge, the court said at page 488:

> "It afterwards gave, at the request of the defendant Steiner, the following instruction in cause No. 8806:
>
> 'While a deceitful contrivance or fraudulent device to evade the provisions of a lawful regulation may not be legally resorted to for effective accomplishment of the evasion, yet if the defendant, in good faith, conscientiously believed that he was not violating the law in anything that he did or failed to do as shown by the evidence, he is not guilty of wilfully violating the regulation. This is true notwithstanding his act or omission may, as a matter of law, constitute an evasion of the provisions of a regulation.'
>
> This instruction was given by the court of its own motion in cause No. 8818, and it properly left to the jury the question of the good faith and wilfulness of the defendant in each appeal."

On the question of good faith:

(1) There was no evidence of guilty knowledge;

(2) There was no evidence of any knowledge of the terms of the regulations involved;

(3) There was no evidence of any terms of any regulation which precluded the taking of a gratuity, or in fact of any terms of any regulation;

(4) There was no evidence of the promulgation or publication in the Federal Register of any of these regulations.

POINT FOUR.

Appellants Were Deprived of a Fair Trial by the Government's Use of Inadmissible and Prejudicial Testimony of Agents of the Department of Internal Revenue.

We have heretofore demonstrated the insufficiency of the evidence given by the three witnesses who purchased meat from appellants. We come now to an entirely different type of evidence which the government relied upon. This second segment of the government's case consisted of testimony as to admissions or confessions of general guilt made by the various appellants to the internal revenue agents after appellants had voluntarily filed amended income tax returns.

None of these admissions are tied down to the overt acts charged in any of the counts, but if competent and properly admissible they do show that defendants had been selling their products at over ceiling prices. The effect of such evidence was to automatically prejudice the jury and the trial judge against these appellants.

The appellants' constitutional rights were violated by the receipt of such evidence, and the trial court adopted an inconsistent position in that it held that written signed statements made by appellants to the internal revenue agents were not admissible because not legally obtained from the Commissioner of Internal Revenue; but nevertheless permitted these agents to testify to the contents of such written statements by admitting their testimony of the oral statements which had been reduced to these written statements by a shorthand stenographer. It did this

even though these agents admitted that, before testifying, they had refreshed their recollections by reading the written statements which the trial court had rejected as improper evidence.

These three statements were marked Government's Exhibits Numbers 50, 51 and 52, and have been incorporated in the record at pages 473 to 545, because of the importance that they played in use in refreshing witnesses' testimony and in the preparation of the government's case.

The United States courts have unrelentingly adhered to the principle that an accused should not be convicted by evidence unlawfully obtained. and that it is of far greater importance to preserve these safeguards to liberty and justice than to accomplish a conviction of one, no matter how guilty he may be.

One of the most recent of such expressions is found in *Bollenbach v. U. S.*, 90 L. Ed. 318, 66 S. Ct. Rep. 403, where the court said at page 406:

> "In view of the government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

The internal revenue agents who were called by the government to testify as to appellants' confessions to them gave substantially the same testimony over objection of appellants' counsel. This testimony followed the trial

court's exclusion of the written stenographic reports which the internal revenue agents had taken at the time of these confessions. This ruling of the trial court was made after extensive argument and discussion by counsel for both sides and the court. [R. 284-309.]

We will later deal more specifically with the contents of these confessions, and the facts relating to their procurement and use by the government's counsel. It is first appropriate to observe the statutes and treasury regulations governing the use of information in the possession of the Internal Revenue Department, because if such information was not admissible in evidence, as the District Court held that the written documents were not, then it is apparent that none of such information or documents should have been used either in the preparation of this case, the procuring of the indictment, or by witnesses to refresh their memories.

Section 55 of Title 26, U. S. C. A., governs the use of income tax returns. It provides that they shall be open to inspection and copies furnished "only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President."

These rules may be found in Commerce Clearing House on Taxation, and the pertinent ones are as follows:

T. D. 4945, Sec. 463D.4 (C. C. H., par. 517, p. 3124), entitled "Use of Returns in Litigation," provides:

> "The return of an individual, partnership, corporation, or fiduciary, or a copy thereof, may be furnished to a United States attorney for official use in proceedings before a United States grand jury or in

litigation in any court, if the United States is interested in the result, or for use in preparation for such proceedings or litigation; or to an attorney of the Department of Justice, for like use, upon written request of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General. If a return or copy is thus furnished, it shall be limited in use to the purpose for which it is furnished and is under no condition to be made public except to the extent that publicity necessarily results from such use. The original return will be furnished only in exceptional cases, and then only if it is made to appear that the ends of justice may otherwise be defeated. Neither the original nor a copy of a return desired for use in litigation in court will be furnished if the United States Government is not interested in the result, but this provision is not a limitation on the use of copies of returns by the persons entitled thereto."

T. D. 4945, Sec. 463D.5 (C. C. H., par. 518), entitled "Furnishing of Copies of Returns," provides as follows:

"A copy of a return may be furnished to any person who is entitled to inspect such return upon written application therefor and the submission of evidence satisfactory to the Commissioner of his right to receive the same, except that if a return is in the custody of a collector or of an internal revenue agent in charge or the head of a field division of the Ttechnical Staff, such collector or agent in charge may furnish a copy of such return to a United States Attorney or an attorney of the Department of Justice, or to the taxpayer or his duly authorized attorney in fact, in accordance with these regulations.

> Certified copies will be furnished only upon specific request therefor sent to the Commissioner at Washington."

The above regulations relate to income tax returns, but the information embodied in the written confessions is subject to the same restrictions.

T. D. 4929, Sec. 463C.35 (C. C. H., par. 506), entitled "Information Returns," provides as follows:

> "Information returns, schedules, lists and other statements designed to be supplemental to, or to become a part of, the returns shall be subject to the same rules and regulations as to inspection as are the returns themselves. In any case where inspection of the return is authorized by these regulations, the Commissioner may, in his discretion, permit inspection of other records and reports which contain information included or required by statute to be included in the return."

In *Gibson v. U. S.* (9th Cir.), 31 F. (2d) 19 at 22, the court characterized such a taxpayer's statement in affidavit form as in the nature of a supplemental return and covered by the above quoted regulations.

The testimony of both Internal Revenue Agent James Bryant Eustice and Donald Oliver Bircher consumes extensive space in the record. [Eustice, R. 310-371; Bircher, 265-275 and 371-432.] To quote the full substance of both these witnesses' testimony would be repetitious and unnecessary. The testimony, the objections thereto and the rulings of the trial court were the same with respect to both of these witnesses. The most that can be said is that one merely aggravated the prejudice already wrought by the other.

If anything, Bircher's testimony was the most complete so we will set forth the full substance of his testimony instead of that of Eustice.

The witness Donald Oliver Bircher testified in substance as follows:

> I am a special agent of the Bureau of Internal Revenue. I interviewed William Shubin in the office of the Bureau of Internal Revenue in Los Angeles on the morning of July 24, 1945, and Frederick Shubin on the afternoon of that day, and Jack Kissel on August 1st. In addition to the particular defendant being interviewed at such time there were present special agents of the internal revenue department, Samuel J. Phoebus and Walter Schlick, and also one of our office stenographers, who took down the interview in question and answer form. There was also present Mr. Joseph Brady and Mr. Stanley Anderson, attorneys for the defendants. At the beginning of each of these interviews I advised the defendant present that any statements he made or any documents or evidence he produced at such hearing could be used in any subsequent proceeding by the government, and that he was not required to incriminate himself and that he had the right to refuse to answer any questions if he felt that the answers might incriminate him. I also asked him if he wished his attorneys to amplify that advice, and the attorneys did give him further advice.
>
> Each of the defendants had appeared at the time of his particular interview without subpoena, and each of them indicated that he would willingly and truthfully answer all questions. At these interviews I was investigating the source of the income of the partnership of the three defendants operated under

the name of Vernon Hotel and Restaurant Supply Company, and the individual returns of the three defendants for the years of 1942, 1943 and 1944, as to which the defendants had filed amended returns.

At the beginning of each of the interviews there was a discussion off the record which our reporter did not take down. [R. 372-376.]

The witness was then shown Plaintiff's Exhibits Numbers 50, 51 and 52 for identification, and thereupon the following proceedings were had:

"Mr. McLaughlin: Well, at this time, your Honor, I object to any further questioning on that transaction on the ground that it is an indirect attempt to put into evidence statements made by these parties which are taken down in writing and which are in substance embodied as supplemental returns.

Now, in these cases we were discussing yesterday these very things I mentioned. It characterizes them as in the nature of supplemental returns and to permit a witness to testify to a discussion and conversation which was nothing more than a running question and answer affair which was put down on paper and signed is, I submit, in controversion of the regulation and the Act which we were arguing yesterday.

The Court: No, I don't believe so, counsel. I think that the Act pertains to returns or supplemental returns that are filed in which there is no preliminary such as we have here now. The court looks upon it as a complete waiver. The defendants appeared and offered to make these statements and were told that they might be used subsequently. No objection was made and I believe that comes under the statutory provisions that we discussed yesterday.

I will overrule it and allow an exception to the defendants." [R. 376-377.]

Thereupon it was stipulated that the defendants could preserve the objection last made to the testimony of the witness on the ground that its use violated the statute and the regulation relating to the admissibility of internal revenue returns and supplemental returns and other information in the possession of the Bureau of Internal Revenue, and on the further ground that it was not properly admissible evidence and was immaterial, and the court stated that such objection should stand to all of the witness' testimony and would be overruled and an exception allowed. [R. 377.]

The substance of the testimony of the witness Donald O. Bircher continued as follows:

> The defendant William Shubin told me that the excess amount which they had reported in their amended returns of approximately $141,000.00 represented overcharges which they had collected from customers in connection with the sale of meat, that is, in excess of ceiling prices. He told me that the correct price was billed on their invoices, and usually paid by the customer by check, and that the overcharges were collected in secret in the form of cash, and that some customers were charged a higher overcharge than others. William Shubin said that he kept a temporary record of the overcharges which had not been paid by customers, and that as they were paid, the name of such customer was stricken from the temporary list, and when all overcharges were paid the temporary list was destroyed. He stated that he kept the money concealed at his house, and

that he only overcharged what he thought was a reasonable sum at that time, and when he was getting a higher price for lard, he didn't have to overcharge so much on other commodities to keep things running smoothly, and that the customers did not have to be plodded about making their payments of the overcharges, as they had been trained. He said he did not enter overcharges as a rule on the books because he did not want the OPA to find out about them. [R. 377-382.]

The witness then testified (on *voir dire* by Mr. McLaughlin) as follows:

"Mr. McLaughlin: May I ask a few more questions?

The Court: Yes.

Q. By Mr. McLaughlin: Mr. Bircher, before you testified this morning you read those statements, didn't you? A. I have read them partly. I don't know that I have read them completely and I don't know that I have even read them completely now, but for a long time I have had the substance of all of them in mind.

Q. How many times did you read them immediately prior to your testimony this morning, or any parts of them? A. Oh, I would say six or seven times; in fact, I read them over once or twice before they were signed, during the time they were being reviewed by the defendants, and I have read them over during the time I was writing reports pertaining to them. I have read them over a number of times.

Q. Did you read any of those three statements clear through just immediately before you took the witness stand this morning, within the last two or

three days? A. I think I read over the first one, that is the one of William Shubin, but I don't think I read over either of the other ones completely through. I have merely glanced at them.

Q. Which one did you read this noon? A. I looked them all over merely casually.

Q. What evidence were you trying to refresh your mind on that you did not know?

Mr. Strong: I don't think that is a proper question.

The Court: Well, I will permit it.

A. I didn't have any particular fact in mind. I just thought that I might refresh my recollection. We discussed many things, of course, during those interviews. It extended quite a period of time.

Q. By Mr. McLaughlin: Are you able to state what facts you can testify to today if you had not read those statements within the last few days?

Mr. Strong: I don't think that is material, your Honor.

The Court: That is a conclusion. I don't suppose any witness would know how to answer that. Continue, if you have any other questions." [R. 400-401.]

The witness continued on direct examination subject to the objections heretofore made, and his testimony was in substance as follows:

On August 1, 1945, when Jack Kissel appeared with his attorneys, Joseph Brady and Stanley Anderson, for the purpose of giving his voluntary statement, he delivered to me Mr. Rausch's audit [Government's Exhibit No. 58 for Identification]; that is,

Stanley Anderson handed it to me in the presence of Jack Kissel, and Jack Kissel said it represented Mr. Rausch's audit. [R. 404.]

Thereupon the following proceedings took place:

"Mr. Strong: I offer this into evidence, your Honor.

Mr. McLaughlin: Just a minute. May I ask the witness a few questions?

Mr. Strong: Yes.

The Court: Yes.

Q. By Mr. McLaughlin: Was Mr. Kissel there? A. Yes.

Q. And who else was there among the defendants? A. No other defendant. Attorney Joseph Brady and Attorney Stanley Anderson for Mr. Kissel.

Q. That document was handed to you in connection with information relating to their personal returns? A. No, the audit itself and the report says it is in connection with an audit of the Vernon Hotel & Restaurant Supply Company; and it is so captioned in that opening statement.

Q. But you were investigating—pardon me, go ahead. A. And it is so captioned in the cover letter which is signed by Mr. Rausch, and which letter is dated July 24, 1945.

Q. Well, at that time you were investigating and had under your investigation the matters of the individual returns of William and Frederick Shubin and Jack Kissel, did you not? A. Yes; also the tax on the income of the partnership, which had to be determined first.

Mr. McLaughlin: Now, if your Honor please, I object to that on the ground that it is another docu-

ment which comes within the category of a supplement to an income tax return, and it has not been shown to have been obtained in accordance with the rules and regulations and the law relating to it. And in this connection I make the further objection that it is privileged, and if there is any answer to that, certainly there has been no waiver of any privilege insofar as the two Shubins are concerned.

The Court: Well, I think a voluntary presentation of a statement in the presence of the defense attorneys and advice of his attorneys to this witness—I don't see how you can call that privileged when he hands it to him. And secondly, I do not believe that this comes under the rule of the statute, the statutory rules that we discussed, because this has never been a part of the Government's record at all so far as our record shows here.

Mr. McLaughlin: He has produced it out of his files. That is only one point.

The Court: Well, but it never became a part of the files that were filed in Washington.

Mr. McLaughlin: I want to fix the record on that.

The Court: Oh, yes, certainly; make your record.

Q. By Mr. McLaughlin: Mr. Bircher, that document that you have been identifying has been in the office of the Treasury Department of Los Angeles where you maintain your office, hasn't it? A. Yes.

Q. And it has been one of the files and records of your department here? A. Yes.

Mr. McLaughlin: Now, your Honor, on the question of privilege, an attorney cannot waive privilege, as I understand the law.

The Court: Even his client is present?

Mr. McLaughlin: Well, that is what I say. Mr. Kissel was present but not the two Shubins. They were not present when this was delivered.

The Court: If there was one statement made by one conspirator, it is binding on them all if you find that there was a conspiracy.

Mr. McLaughlin: True, your Honor, if that is sufficient to constitute a waiver of privilege. When we are dealing with an admission which may constitute a conspiracy, that is one thing; but we are dealing with Section 1881 of the Code of Civil Procedure, which specifies and provides that statements between an attorney and client are privileged under the law. And I have ample authorities on that if your Honor cares to hear them. An attorney can't waive that privilege. The only person on earth who can waive it is the individual, and the only one of these individuals that was present at that time was Jack Kissel; and I submit that there is no showing here that the two Shubins ever waived their privilege.

Mr. Strong: May I say, your Honor—

The Court: No. Overruled, exception allowed. Proceed." [R. 404-407.]

The witness continued his testimony as to Frederick Shubin as follows:

"Q. Now, will you relate what questions you asked the defendant Frederick Shubin and what answers you got during that conference in connection with the income and source of income on the income tax returns of the Vernon Hotel & Restaurant Supply Company?

Mr. McLaughlin: Before that question is answered, may I ask the witness a few questions?

The Court: Yes.

Q. By Mr. McLaughlin: Mr. Bircher, when did you last read the written statement of Frederick Shubin? A. I glanced at it this noon, but I don't think I have read it completely for many months.

Q. When you say you glanced at it do you mean that you looked at and read the front sheet, and then passed over, or did you turn the pages and look at several pages? A. I looked at several different pages, but I was hungry and I didn't take time to read them all in detail.

Q. You did not read it entirely through? A. That is correct.

Q. Were you conferring with Mr. Strong this noon about the contents? A. No; I have not.

Q. Before you came to court this morning did you look at the statement of Frederick Shubin? A. Yes; I reviewed them all last night casually.

Q. Well, when you say 'casually' do you mean you read them or you did not? A. I read portions of them, maybe turning the first page and then jumping to the fifth page, just kind of to refresh my memory a little bit. I didn't read them thoroughly.

Q. That was last evening? A. That is correct.

Q. Prior to last evening, how long was it since you read them? A. Probably four or five days or a week that I casually looked them over. I haven't looked them over thoroughly for many months.

Q. Well, ever since this proceeding has been going on you have been refreshing your recollection or looking at them from time to time, haven't you? A. Yes.

Q. To keep your memory refreshed? Now, are you able to state today what things Frederick Shubin

said to you, without recalling what you have read at these times from the statements?

Mr. Strong: I object to that, your Honor.

The Court: Oh, I will permit it to be answered.

A. Yes; I can state in substance what was said without refreshing my memory. I know what was said.

Q. By Mr. McLaughlin: Could you have done that before you read it last night? A. Yes.

Q. You could? A. Yes.

The Court: Proceed, gentlemen.

Mr. McLaughlin: Before he proceeds, I want to make the objection so I won't be interrupting, to his testimony regarding the discussions with Mr. Shubin on the ground that he is testifying from documents and from conversations that were given in the course of his official duties as a Collector of Internal Revenue at the time that the defendants Frederick Shubin was performing his official duties and giving information that was confidential, and his testimony is in effect testimony as to the contents of documents which he has seen and read constantly since the time it was taken.

Mr. Strong: I am going to state, your Honor, that there is nothing here and nothing that I know of in the law which makes the testimony of Frederick Shubin confidential. He gave it voluntarily to these people in support of his own claim in connection with his own income tax returns. He was trying to justify certain things he did.

The Court: Overruled and exception. Proceed." [R. 416-420.]

The substance of the witness' testimony with respect to Frederick Shubin's statements was substantially the same as his testimony as to the statements of the other two defendants. [R. 420-424.]

He also testified on *voir dire* examination, in answer to the questions of the defendants' counsel, that he had read the statement of Jack Kissel many times since he received the Commissioner's letter of authority, in order to refresh his recollection. [R. 424-426.] Following that, the following objection was again made to his testimony:

> "Mr. McLaughlin: That is all the questions I have. And, if your Honor please, I wish to object, stating the same grounds as stated, as the basis of the objection to the testimony regarding the other two discussions, that is, with the two Mr. Shubins; and I wish to have it stipulated that my objection goes to all these questions and answers so that I won't have to object every time.
>
> The Court: It will be so understood. Overruled. Proceed." [R. 426.]

The District Court in sustaining appellants' objection to the written confessions because there was no showing of a request made to the Commissioner for the returns of appellants, as required by the above quoted Treasury Regulation, said that the statute would be meaningless if it did not intend rules by which discretion was to be exercised to be complied with. Its specific language is as follows:

> "The Court: But now, assuming that is correct, would it not be necessary in order to comply with the statute to get the same authority in order to secure

the information that you requested from the Commissioner?

In other words, counsel, the statute was passed by Congress for a definite purpose and a very proper purpose and that was to keep as secret in the files of the government of the United States all of the returns on of taxpayers.

The same applies to examinations of national banks and heavy penalties are imposed upon divulging any information secured by those departments.

Now, Congress saw fit to make some exceptions, and in order to take advantage of those exceptions the statute in my opinion must be strictly complied with." [R. 303-304.]

* * * * * * * *

"The Court: Now, there is no request made under the statute for the information with reference to these individuals. Now, can the court so construe that statute and say, 'Well, it doesn't make any difference. We have got a name here anyway and anybody that is connected with that company, we can secure their returns?'

I assume that the Attorney-General and the Commissioner of Internal Revenue act with discretion under the statute. Now, the request was for the Vernon Hotel and Restaurant Supply Company, information about that company.

Mr. Neukom: Which is a co-partnership. Pardon my interruption.

The Court: Suppose there were 50 partners and the Attorney-General I assume would go down through there and say, 'Here are five that we didn't make a request for for some reason. We will not

permit that information to be divulged. We have other matters pending, or there are other matters in the Department so that we cannot furnish that.'

I assume that they all act with discretion. I don't believe that they just act without any consideration, otherwise the statute would be meaningless.

Now, the Attorney-General and the Commissioner of Internal Revenue have no information as far as these letters are concerned that the United States Attorney here desires information with reference to individuals and particularly when the United States Attorney did name individuals in connection with another case that I believe is pending in this court." [R. 307-308.]

The Act and the regulations in limiting access to, and the use of, returns were designed to protect the taxpayer, and a conviction based upon returns obtained without complying with these is erroneous. The testimony of the internal revenue agents shows clearly that they used the returns to refresh their recollections as to what appellants told them. In addition to this, their testimony was inadmissible even if not refreshed by reading the transcribed statements of appellants, because it was as to information given them by taxpayers while they were acting as internal revenue agents in the process of supplementing the files of the internal revenue department. It was given before a court reporter employed by the department for the purpose of bing transcribed and then signed by appellants.

It is not necessary to pursue the discussion of this obvious principle. Section 463c.35 of the above quoted

Treasury Regulations expressly includes any "statements designed to be supplemental to, or to become a part of, the returns," as being subject to those regulations.

Evidence unlawfully obtained cannot be used in a criminal proceeding.

See

Silverthorne Lumber Co. v. U. S., 251 U. S. 385, 64 L. Ed. 319;

McNabb v. U. S., 318 U. S. 332, 87 L. Ed. 819;

Agnello v. U. S., 269 U. S. 145, 70 L. Ed. 145;

Gauled v. U. S., 255 U. S. 298, 65 L. Ed. 647;

Amos v. U. S., 255 U. S. 313, 65 L. Ed. 654;

Weeks v. U. S., 232 U. S. 383, 58 L. Ed. 652;

Boyd v. U. S., 116 U. S. 616, 29 L. Ed. 746;

Flagg v. U. S. (2nd Cir., 1916), 233 Fed. 481;

Walker v. U. S. (5th Cir., 1942), 125 F. (2d) 395; and

Rogers v. U. S. (1st Cir., 1938), 97 F. (2d) 691.

The language in all of these cases is pertinent, but in the interest of brevity, we quote only from *Silverthorne Lumber Co. v. U. S.* (251 U. S. at p. 391) as follows:

> "The government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had.
>
> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy

them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. *Weeks v. United States,* 232 U. S. 383, 58 L. ed. 652, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the 4th Amendment to a form of words. 232 U. S. 393. *The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed.* The numerous decisions, like *Adams v. New York,* 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372), holding that a collateral inquiry into the mode in which evidence has been got will not be allowed when the question is raised for the first time at the trial, are not authority in the present proceeding, as is explained in *Weeks v. United States,* 232 U. S. 383, 394, 395, 58 L. ed. 652, 656, 657, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117. Whether some of those decisions have gone too far, or have given wrong reasons, it is unnecessary to inquire; the principle applicable to the present case

seems to us plain. It is stated satisfactorily in *Flagg v. United States,* 147 C. C. A. 367, 233 Fed. 481, 483. In *Linn v. United States,* 163 C. C. A. 470, 251 Fed. 476, 480, it was thought that a different rule applied to a corporation, on the ground that it was not privileged from producing its books and papers. But the rights of a corporation against unlawful search and seizure are to be protected *even if the same result might have been achieved in a lawful way."* (Italics ours.)

Since the government failed to show that it had obtained the written statements in accordance with the procedure specified in the Treasury Regulations, we believe that each of the following propositions are clear:

(1) They were not admissible in evidence. The trial court sustained this principle.

(2) The agents' oral testimony was likewise inadmissible for the same reason that evidence of any statements of a taxpayer is improper unless the Treasury Regulations have been complied with.

(3) Such oral testimony was improperly received for the further reason that the witnesses admittedly refreshed their recollections from the inadmissible written statements.

Waiver.

The trial court, in rejecting the last two principles, indicated that appellants had waived their right to object to the use of such evidence, because Donald O. Bircher testified that before taking appellants' statements, he ad-

vised them that such statements could be used against them in subsequent proceedings by the government. [R. 376.] It is obvious that there could not have been a waiver of the right to keep out the oral statements and, at the same time, no waiver of the right to exclude written statements, yet the trial court adhered steadfastly to its ruling that the written transcriptions of these oral statements were not admissible. In this latter position it was as correct as it was erroneous in its position as to the oral testimony of the appellants' admissions.

There is no evidence that appellants were ever asked to waive the provisions of the Treasury Regulations relating to the use by the government in any actions of their oral or written statements. In the absence of clear proof of such a waiver, it cannot be presumed.

In *Johnson v. Zerbst*, 304 U. S. 458, 82 L. Ed. 1461, the court had before it the question whether the accused had waived his right to legal counsel. In holding that there was no such waiver, the court said at page 464:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

Assuming, but not conceding, that appellants could legally waive compliance with these Treasury Regulations for all purposes, they did not so do, nor were they requested to do so.

The uncontroverted evidence shows that in giving these statements to the internal revenue agents, they did so with the express understanding that such statements would not be used in any investigation or prosecution involving OPA violations.

Mr. Joseph D. Brady, an attorney specializing in tax law, testified that prior to the investigation of the internal revenue agents, appellants had employed him to prepare their amended tax returns. [R. 460.] On direct examination the District Court refused to permit him to testify as to the understanding that he had with Mr. Bircher and the agents of the Internal Revenue Department regarding their limited use of the statements which appellants later made. [R. 461-462.] On cross-examination by government counsel, however, the court permitted him to testify as to his understanding with these agents immediately before the three appellants signed their statements. This testimony is as follows:

> "Q. And you came in voluntarily to discuss the matter, didn't you, Mr. Brady? A. Yes; pursuant to the understanding that I had.
>
> Q. And it is true that at that time, among others, a question such as this was used of Mr. Shubin before he gave any replies: 'You are advised, Mr. Shubin, that any statements you make at this hearing or conference, or any documents produced may be used by the Government in any subsequent proceedings, and

that you have the right to refuse to answer any questions that you feel might tend to incriminate you. Do you understand that, or do you wish your attorney to explain it to you?' You recall that such a question or explanation was made by Mr. Bircher to Mr. Shubin? A. That is right.

Q. And Mr. Shubin replied that: 'I believe I understand that,' did he not? A. If the record shows, and my recollection is he said substantially that.

Q. And is it not true that you also counselled with Mr. Shubin and there was some, as you attorneys call it, discussion off the record where you advised Mr. Shubin that it was proper to go ahead and answer the interrogatories that were given? A. I believe that is so.

Q. And it is true that at a later date, a few days later, after this report had been written up or the proceedings had been written up, that Mr. Shubin was accorded the privilege to come to the office of Mr. Bircher here in this building, was given the original and copies of the proceedings that had been taken, and did in your presence sign all of the documents which reflected the questions and answers? A. That is true, but only after a reiteration of the specific understanding that they were for the eyes of the Treasury Department only.

Mr. Neukom: May I move that the answer be stricken as not responsive?

The Court: That is stricken out, but I am going to permit the witness to state the conversations very completely if the question is asked. If not, I am going to permit the defense counsel to ask the question.

Mr. Neukom: Very well.

The Court: Proceed. Any other questions?

Mr. Neukom: Yes.

Q. And this is Mr. Shubin's signature that was signed to the document in question? A. It looks like it to me.

Q. And signed on August 13, 1945? A. I have no doubt that is the date.

Q. And the same policy in general was followed as to Frederick Shubin, only his matter was taken up in the afternoon, wasn't it, Mr. Brady? A. Oh, I think all the papers were signed at the same time, one particular morning. We may have stayed there until two o'clock.

Q. But I mean they were interrogated upon the same explanations, that whatever might be obtained might be used against them; isn't that correct? A. The same policy was followed.

Mr. Neukom: That is correct. I was referring to what was Government's Exhibit 50 for identification. That is all.

The Court: Mr. McLaughlin?

Redirect Examination

By Mr. McLaughlin:

Q. Mr. Brady, you said that they signed those statements after reiteration of the assurance. Would you state what was said and who said it? A. Mr. Bircher was there in the early part of the morning. He was not there at the time the statements were signed, but before they were signed, I turned to Mr. Phoebus who was there and I said to Mr. Phoebus: 'It is the understanding, is it not, that these are for the eyes of the Treasury Department only?' and he answered, to my recollection, 'Yes.'" [R. 465-467.]

Two of the internal revenue agents who had worked on appellants' records and elicited information from them testified to substantially the same understanding, indicating that it was never the intention of appellants to waive the provisions of these Treasury Regulations.

Samuel J. Phoebus, on being called by appellants' counsel, testified that while he was in the course of making an audit of appellants' books in August or September of 1945, he had a discussion with appellants Jack Kissel and William Shubin at their plant as follows:

> "Q. Now, state what was said. A. Bill Shubin expressed the fear that the matters which we were discussing would be revealed to the OPA and I told him that regardless of the origin of the funds or what illegitimate business the taxpayer might be in that it was the policy of the Bureau to consider these returns confidential, and either on that occasion or another occasion I pointed out to him that even in court that I could not testify in relation to the things which he was telling us unless I was authorized to do so." [R. 449.]

The testimony of Special Agent Walter E. Schlick was substantially the same in that it shows there was no intentional or express waiver of these Treasury Regulations. It was as follows:

> "Q. Do you recall a discussion that you were present at regarding your department revealing information that they gave you? A. Yes, sir.
>
> Q. Will you state when that took place as near as you can, Mr. Schlick? A. The date will have to be established as being an approximation. As has

been previously testified when the investigation continued over a period of time conversations are had at various intervals and as to segregate any particular conversation with reference to any particular date, it is physically impossible. I would say that as near as I can recall that particular conversation was in the latter part of August or the first part of September of 1945.

Q. And that was at the plant of the Shubins? A. Yes, sir.

Q. Will you state what you said and what they said as near as you can? A. The conversation was relative to the confidential matters which were being discussed at that time which, of course, so far as we were concerned, was merely income tax matters and the defendants were concerned about the information becoming common knowledge to the OPA officials.

We could not conscientiously assure them that the information would never be made known to them, but we did say that it is the policy of the Bureau to not divulge that information, that information given in the course of a tax investigation is inviolate and is confidential and should not be revealed to anyone except those authorized by the Treasury Department." [R. 451-452.]

James Eustice, one of the agents present at the time the appellants' statements were taken down, and who testified to subsequent interviews that he had with the appellants, was asked on *voir dire* if he had told appellants that their statements to him might be used against them. His answer was: "I didn't warn them at any time." [R. 358.]

The court then denied appellants' motion to strike the testimony of Eustice upon the assurance of government counsel that he would show that appellants were so cautioned. [R. 358-359.]

The witness Bircher did testify that he cautioned them as to the possibility of their statements being used against them, but he does not deny the testimony of Joseph Brady that there was an understanding that the statements would be solely for the eyes of the Internal Revenue Department. In fact, he admits that before the appellants gave their respective statements there was a discussion off the record. [R. 375.]

The situation can be summarized as follows:

(1) A waiver of the requirements of the treasury regulations in obtaining and using tax returns would have to be explicit.

(2) Such waiver is not presumed but the burden is upon the government to show it by clear evidence.

(3) There is no such evidence of waiver.

POINT FIVE.

The District Court Erred in Denying Appellants' Motion to Quash the Indictment and in Refusing to Permit an Inquiry into the Use of Inadmissible Evidence Before the Grand Jury and in the Preparation of the Government's Case.

After the District Court had refused to receive the written statements [Government's Exhibits Numbers 50, 51 and 52 for Identification] in evidence, appellants' counsel moved to dismiss the indictment on the ground that this unlawfully-obtained evidence had been used in the preparation of the government's case and in procuring the indictment. [R. 385-397.]

This motion was denied and appellants' counsel was denied the opportunity to inquire into the extent that this evidence was used before the grand jury. [R. 397.]

The evidence showed that during the course of the grand jury investigation in September, 1945, government counsel in Los Angeles requested the Attorney General in Washington to obtain from the Commissioner of Internal Revenue certain tax returns of designated individuals and corporations. This request did not mention any of appellants but it did mention the name of a partnership under which they did business, by the name of Vernon Hotel & Restaurant Supply Co.

As its proof that the Government had followed the procedure prescribed by the Treasury Regulations, its counsel introduced three letters, all of which are marked Government's Exhibit 55. [R. 294-298.] The first was

a letter dated September 27, 1945 which we quote as follows:

"WS/BVB

September 27, 1945

The Attorney General
Department of Justice
Washington 25, D. C.

In re: Southern California Meat Company,
Southern California Meat Company No. 2
Central Packing Company
Vernon Hotel & Restaurant Supply Co.
Hyman Stillman
Lou Segal or Siegal, and others
Your Reference: . . .

Sir:

In the above-entitled matters the defendants are to be charged with conspiracy to violate, and with various violations of the Emergency Price Control Act.

We are now in the process of conducting a Grand Jury investigation into the activities of these companies and individuals. Agents of the Bureau of Internal Revenue, in connection with income tax returns of the named individuals and concerns, appear to have been furnished certain information which will be very pertinent to the trial of the case arising from the instant investigation.

Will you please secure the authority of the Commissioner of Internal Revenue for Special Agents D. O. Bircher and Samuel Phoebus, and Internal Revenue Agent J. Bryant Eustice to testify on the trial of the above-entitled case, and to furnish such

information and documents as are in their possession, pertinent to said case?

Respectfully,

CHARLES H. CARR,
United States Attorney."

[R. 294-295.]

It will be noted that the letter does not refer to any of these three appellants.

The second letter was from the Attorney General's office in Washington to the United States Attorney in Los Angeles, stating that the request had been made to the Commissioner and that he had granted such request. Here again this letter fails to mention any of these three appellants. [R. 295-296.]

The third letter was a copy of the Commissioner's consent, which we quote as follows:

"Oct. 5, 1945

"Hon. Theron L. Caudle,
Assistant Attorney General,
Department of Justice,
Washington 25, D. C.

In re: Southern California Meat Company,
Southern California Meat Company No. 2,
Central Packing Company,
Vernon Hotel & Restaurant Supply Co.,
Hyman Stillman,
Lou Segal or Siegal, and others.
(Emergency Price Control Act.)

Dear Mr. Caudle:

Reference is made to your letter dated October 4, 1945, enclosing a copy of a letter dated September

27, 1945, from the United States Attorney for the Southern District of California. In his letter the United States Attorney states that a grand jury investigation is being conducted with a view to ascertaining whether any of the above-named taxpayers have violated the Emergency Price Control Act. The United States Attorney also states that certain investigating agents of the Bureau while making an income tax investigation have obtained certain information that will be pertinent in any trial of the taxpayers arising from their indictment for violations of the Emergency Price Control Act. The United States Attorney requests that you secure authority for Special Agents D. O. Bircher and Samuel Phoebus and Internal Revenue Agent J. Bryant Eustice to testify at the trial of the cases and to furnish such information and documents as are in their possession pertinent to said cases. In your letter you request that the Bureau cooperate with the United States Attorney.

In accordance with your request authority will be given the special agents and the revenue agent to furnish the United States Attorney such information and documents as may be in their possession regarding the violations of the Emergency Price Control Act by the above-named taxpayers, and, upon proper subpoena, to testify at grand jury proceedings and at the trial of the taxpayers in the event that they are indicted for violations of that Act.

Very truly yours,

(Signed) W. T. SHERWOOD,
Acting Commissioner."

[R. 296-298.]

Here again no mention was made of any of the appellants. It clearly appears from these communications that it was the intent of the United States Attorney to use the internal revenue agents and the information he obtained from them before the grand jury.

The above are the only letters produced by the government purporting to comply with the Treasury Regulations. Government counsel immediately obtained all the information from the witnesses Bircher and Phoebus as to appellants' amended returns, including the individual statements of each of the three appellants [Government's Exhibits 50, 51 and 52 for Identification], which the District Court held to be inadmissible because not covered in the request to the Commissioner of Internal Revenue. [R. 299-309.]

The following portions of the record show that there was ample justification for the appellants' contention that the indictment was procured by the use of this improperly obtained evidence:

> "Mr. McLaughlin: Well, your Honor, I think that in the discussion yesterday, Mr. Strong in discussing those three statements which he sought to introduce into evidence, at the time the Grand Jury began to deliberate, he said, we did not know the names of all these parties at that time; and, he said, that is why we did not put them down. I assume that he, in writing for those things last fall, if he did, wrote for them for use in connection with the Grand Jury.
>
> The Court: The record now shows, unless you have something different, that that is not correct.

Mr. Strong: May I say something? I do not see what the letters which we wrote have to do with this Grand jury altogether.

The Court: Well, I want Mr. McLaughlin to make his record.

Mr. Strong: Yes.

The Court: Because the defense are entitled to that.

Mr. Strong: I have no recollection of any of these documents being used before the Grand Jury; and I can say that, as far as I remember, none of these letters were used before the Grand Jury and I do not remember of any statements being used.

The Court: All right.

Mr. McLaughlin: Mr. Strong, when you say you do not remember any statements being used before the Grand Jury, do you include in that those three statements?

Mr. Strong: Those are the ones I am talking about. I am talking about those three statements.

The Court: 50, 51, and 52?

Mr. Strong: Yes.

Mr. McLaughlin: And they were not so read or exhibited?

Mr. Strong: I do not recall their being read at all at any time.

The Court: Unless the defense counsel has some evidence to the contrary, I suppose that must be accepted by the court.

Mr. McLaughlin: I think that is right, your Honor.

The Court: That would be true on that point. Have you some other point, Mr. McLaughlin?

Mr. McLaughlin: Well, it is tied in with this, although a distinctly different point. I am going to make it now, as long as we have some time.

The motion which I was going to make was that evidence which had been illegally obtained was used before the Grand Jury. Mr. Strong states to the court it was not; so, on his statement, we accept that.

The other motion that I was going to make was that there was not sufficient evidence offered before the Grand Jury to show the commission of a crime.

Now, there again, I will be very frank with the court, and I was going to premise that motion on the same contention and I realize that your Honor has discretion in inquiring into whether there was sufficient evidence or not; and I think that any objection I might advance, in view of the fact that letters were written last fall when this investigation was under way, and that at least the United States Attorney had them in his possession, that I should request permission to have the transcript examined and the minutes examined to see whether there was evidence of a crime as shown in the indictment." [R. 385-387.]

Thereupon the court's attention was directed to the letter of the United States Attorney [Government's Exhibit 55] wherein it was stated that the purpose of the information requested was for the use in the grand jury

investigation then under way. The appellant's attorney then continued his statement to the District Court as follows:

> "Now, the intention apparently was to use those things and quite obviously, and there again I have to guess because I wasn't there, but quite obviously he is there asking to use Internal Revenue Agent J. Bryant Eustice and D. O. Bircher and that those men in testifying would have used those statements to refresh their recollection, and the whole thing comes down to the point that I want to argue in this case that even if they weren't actually introduced before the grand jury they were obtained by the United States Attorney and the United States Attorney procured them from the Internal Revenue Department to come into court and testify to matters which were also set forth in those things if they did not exhibit them to the grand jury and I submit that the material contained in those is confidential and that the United States Attorney unlawfully obtained it for purposes in connection not only with the grand jury but also in connection with the investigation.
>
> The code section which is involved in this case makes a specific provision against the use of income tax returns for any purpose except as authorized by regulations. Now, there must have been reason for adopting that code section and the only policy reason that I can see for adopting that code section and the only policy reason that I can see for adopting such a regulation was to afford some protection to taxpayers who are required in their returns to set

forth the facts as to where they got their income and so forth. The government is interested in collecting taxes and it wants to afford a certain amount of confidence or privacy to persons who are truthful enough to submit their returns honestly and who may have obtained income in some manner that may or may not violate the law.

The government collects that money as income and it rightly should and in order to encourage people to make accurate returns and not be jeopardized by criminal prosecution, I think that statute was enacted for that purpose.

Now, the regulation goes along and it does not say that the Commissioner shall in all instances furnish it to the government. It states some conditions there and as your Honor observed yesterday it shows that there is some discretion which must be exercised. Otherwise there would be no purpose for any regulation. The statute might just as well have read and said and the regulation too that whenever anybody in the government wants a copy they shall have it, but it did not say that and I submit therefore that this is a very important statute and if it is to be just slid over and disregarded in all these matters that it is being nullified, and I submit that when the United States Attorney obtains one of those returns in violation of the statute or not in compliance with the statute and rules and regulations and uses it in connection with getting information for an indictment and perhaps for use, according to this letter he certainly intended to use the two agents out here

whom he mentioned and any documents that they have in their charge, and I submit that they have violated the laws of this country with respect to search and seizure and that the indictment for that reason should be quashed." [R. 389-390.]

The court in denying the appellants' motion was apparently motivated by the statement of Mr. Strong that he had no recollection of using these documents before the grand jury. Its ruling was as follows:

"The Court: In view of the statement of the government the motion to quash will be denied and exception allowed the defendants. The motion to dismiss will be denied and exception allowed the defendants." [R. 397.]

Mr. Strong did admit that he had studied and discussed these statements during the course of the grand jury investigation. If he did not actually present them to the grand jury, it must have been because the oral testimony of the witnesses Bircher and Eustice accomplished the same purpose. We have already quoted the Treasury Regulation showing the same restrictions upon the use of such oral testimony as those applying to documents in the possession of the Internal Revenue Department.

When Mr. Strong was called as a witness by appellants' counsel, he admitted that he received these three documents from the Internal Revenue agents shortly after

the letter of authority came from the Commissioner. He did not remember using them before the grand jury, but he said, "They are very important documents to us." [R. 456.]

On objection of government counsel, the court refused to permit further questioning of Mr. Strong, thereby denying appellants the opportunity to show the extent to which information obtained from the internal revenue department had been used. [R. 458-459.]

If evidence is improper at a trial, it is likewise prejudicial to use it in procuring the indictment or in preparing the government's case. If authorities were needed to sustain this obvious principle, the cases which we cited under the previous subdivision of this brief clearly sustain it.

In concluding this subdivision, we submit that the District Court should have permitted a full inquiry into these matters and if it appeared that improper evidence was used before the grand jury it should have granted appellants' motion to dismiss.

See:

United States v. Alper, (2nd Cir.), 156 F. (2d) 222 at 226;

United States ex rel Potts v. Robb, (3rd Cir.), 141 F. (2d) 25; and

Rules 6(e) and 12 of Federal Rules of Criminal procedure.

POINT SIX.

The District Court Erred in Admitting Into Evidence an Accountant's Statement Prepared Under the Supervision of Appellants' Tax Counsel and Delivered By Him to Agents of the Department of Internal Revenue.

The witness Bircher identified an accountant's statement prepared under the supervision of appellants' tax attorneys which is an analysis of the overcharges received by appellants and which was equally as prejudicial as the transcribed statements of appellants previously discussed herein. The court received it in evidence [Government's Exhibit 58] over objection both that it had not been procured pursuant to the procedure prescribed by the Treasury Regulations above discussed, and also on the further ground that it was a privileged communication within the definition of Section 1881 of the California Code of Civil Procedure.

Subdivision 2 of that section provides:

> "*Attorney and client.* An attorney can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity."

There was no evidence that either appellants William Shubin or Frederick Shubin had authorized its delivery or disclosure to the Internal Revenue agents and neither of them were present at the time their tax counsel delivered it. [R. 405-407.]

The record of the objections and ruling of the court on this is as follows:

"Mr. McLaughlin: Now, if your Honor please, I object to that on the ground that it is another document which comes within the category of the supplement to an income tax return, and it has not been shown to have been obtained in accordance with the rules and regulations and the law relating to it. And in this connection I make the further objection that it is privileged, and if there is any answer to that, certainly there has been no waiver of any privilege insofar as the two Shubins are concerned.

The Court: Well, I think a voluntary presentation of a statement in the presence of the defense attorneys and advice of his attorneys to this witness —I don't see how you can call that privileged when he hands it to him. And secondly, I do not believe that this comes under the rule of the statute, the statutory rules that we discussed, because this has never been a part of the Government's records at all so far as our record shows here.

Mr. McLaughlin: He has produced it out of his files. That is only one point.

The Court: Well, but it never became a part of the files that were filed in Washington.

Mr. McLaughlin: I want to fix the record on that.

The Court: Oh, yes, certainly; make your record.

Q. By Mr. McLaughlin: Mr. Bircher, that document that you have been identifying has been in the office of the Treasury Department of Los Angeles where you maintain your office, hasn't it? A. Yes.

Q. And it has been one of the files and records of your department here? A. Yes.

Mr. McLaughlin: Now, your Honor, on the question of privilege, an attorney cannot waive privilege, as I understand the law.

The Court: Even if his client is present?

Mr. McLaughlin: Well, that is what I say. Mr. Kissel was present, but not the two Shubins. They were not present when this was delivered.

The Court: If there was one statement made by one conspirator, it is binding on them all if you find that there was a conspiracy.

Mr. McLaughlin: True, your Honor, if that is sufficient to constitute a waiver of privilege. When we are dealing with an admission which may constitute a conspiracy, that is one thing; but we are dealing with Section 1881 of the Code of Civil Procedure, which specifies and provides that statements between an attorney and client are privileged under the law. And I have ample authorities on that if your Honor cares to hear them. An attorney can't waive that privilege. The only person on earth who can waive it is the individual, and the only one of these individuals that was present at that time was Jack Kissel; and I submit that there is no showing here that the two Shubins ever waived their privilege.

Mr. Strong: May I say, your Honor—

The Court: No. Overruled, exception allowed. Proceed." [R. 405-407.]

The above mentioned section on privilege governs trials in the United States District Courts.

See:

Doll v. Equitable Life Assurance Society, 138 Fed. 705; and

Metzler v. United States, 64 F. (2d) 203.

POINT SEVEN.

Appellants' Respective Admissions to the Internal Revenue Agents Constitute the Only Evidence of a Conspiracy and Not Being Made in Furtherance of the Conspiracy They Are Insufficient.

Even though we ignore the points heretofore made against the admissibility of the appellants' statements to the internal revenue agents, such statements were still insufficient to establish a *prima facie* case of conspiracy.

The rule is well established that statements of a conspirator not made in furtherance of the conspiracy are insufficient proof standing alone.

In *Dowdy v. United States* (4th Cir.), 46 F. (2d) 417, the court had before it the admissibility of a confession made by one of the co-conspirators to the officers and in holding the same to be inadmissible, it said at page 425:

> "It is well settled that before such a statement or declaration is admissible, it must not only be made during the continuance of the conspiracy, *but it must be made in furtherance of it.* These statements were nothing more than a confession by Martin implicating Funk, and all the authorities hold that they are inadmissible, except as against the party making them. Upon that point, we think the decision of this court in a very similar case is conclusive. *Hauger v. U. S.* (C. C. A. 4th), 173 F. 54." (Italics ours.)

In *Hauger v. United States* (4th Cir.), 173 Fed. 54, the court had before it the admissibility of a confession obtained from one of the conspirators, and in holding the same inadmissible the court said at page 57:

> "It is not necessary, however, to discuss this proposition. The point which we shall consider is whether,

under the circumstances, the alleged confession of Menear to Washer was admissible as the declarations of a co-conspirator. It is a well-settled principle of evidence that in a trial on an indictment for conspiracy after the unlawful agreement has been shown the acts and declarations of co-conspirators are admissible as a part of the *res gestae*. By the act of conspiring together the conspirators have jointly assumed to themselves as a body the attribute of individuality, so far as regards the prosecution of the common design; thus rendering whatever is said or done by any one in furtherance of that design a part of the *res gestae,* and therefore the act of all. For these reasons *the conspiracy must be proved prima facie or such acts, and declarations are inadmissible.* 3 Greenleaf on Evidence (16th Ed.), Sec. 94, note 1. In this case there was an entire absence of evidence to prove the unlawful combination between Menear and the defendant. It is true that Menear stated to Washer, so Washer testified, that about the 1st of October, 1905, he, Menear, and the defendant entered into an agreement or conspiracy to make and pass counterfeit coin. But as to that fact the declaration of Menear was only hearsay. There is no rule which renders the declarations of an alleged co-conspirator, given secondhanded, admissible to prove the existence of the conspiracy. Such declarations are made competent only after the conspiracy has been shown to exist." (Italics ours.)

See, also:

Vogt v. United States (5th Cir.), 156 F. (2d) 308 at 310; and

Yost v. United States (4th Cir.), 157 F. (2d) 147 at 150.

If we eliminate the testimony of the internal revenue agents concerning the respective admissions of appellants,

there is no other evidence to prove the conspiracy. The testimony of the three meat purchasers, Dvorak, Snider and Veuhoff, shows no conspiracy among the appellants. It shows absolutely nothing as to Frederick Shubin, and as to William Shubin and Jack Kissel it shows no more than the payment to one or the other of them of moneys in excess of ceiling. Overt acts are only admissible to prove a conspiracy in instances where two or more of the conspirators have jointly committed such overt acts in such manner as to show that it was pursuant to an arrangement between them.

In *Stack v. United States* (9th Cir., 1928), 27 F. (2d) 16, the opinion typifies the type of overt acts which might be considered in determining whether a conspiracy was formed. In that case the government agent had purchased liquor from one of the defendants at the restaurant and saw him put the money in the cash register. He subsequently saw two other agents go in and purchase liquor in the same restaurant from two other employees or operators. In holding that such acts might be sufficient to show a conspiracy the court said at page 17:

> "Said the court in *Fisher v. United States* (C. C. A), 2 F. (2d) 843, 846: 'The fact that two men are found together breaking into a bank is indubitable proof that they had agreed to commit the burgary.' It is sufficient if the evidence shows such a concerted action in the commission of an unlawful act, or other facts and circumstances from which the inference naturally arises that the unlawful overt act was in furtherance of a common design, intent and purpose of the alleged conspirators. *Calcutt v. Gerig* (C. C. A.), 271 F. 220, 27 A. L. R. 543; *Davidson v. United States* (C. C. A.), 274 F. 285; *Keither v. United States* (C. C. A.), 11 F. (2d) 933."

Conclusion.

A brief summary of the infirmities in the government's case will demonstrate the collective prejudice suffered by the appellants at the trial.

In the first place, the government had no right to use the internal revenue records and testimony of its agents as it did not follow the procedure prescribed by the Treasury Regulations. There is no evidence of a request made to the Commissioner of Internal Revenue for the records pertaining to the individual appellants.

If these regulations are to have any meaning and purpose they should be complied with. The situation is no different than if the government counsel had gone directly to the internal revenue agents and obtained such records and testimony without even pretending to comply with the Treasury Regulations. Evidence not legally or properly obtained cannot be used by the government.

In the second place, the evidence produced from the internal revenue agents, being solely as to individual confessions of appellants, is not sufficient *prima facie* evidence of a conspiracy and there is no other evidence of any concerted unlawful acts of appellants, or of a conspiracy.

In the third place, the evidence of the three buyer witnesses to prove the specific misdemeanor counts is too vague and uncertain to sustain a conviction.

Any one of the foregoing or any of the other points dealt with in this brief is sufficient alone to cause a reversal. The combined prejudice which these errors caused

naturally presents a stronger case for invoking the doctrine of the following authorities:

Bollenbach v. United States, 90 L. Ed. 318, 66 Sup. Ct. Rep. 403;

Glasser v. United States, 315 U. S. 60, 80 L. Ed. 680 at 698;

Bruno v. United States, 308 U. S. 287, 84 L. Ed. 257 at 261;

Vierick v. United States, 318 U. S. 236, 85 L. Ed. 735;

New York C. R. Co. v. Johnson, 279 U. S. 310, 73 L. Ed. 706;

U. S. v. River Rouge Imp. Co., 269 U. S. 411, 70 L. Ed. 339; and

Berger v. United States, 295 U. S. 78, 79 L. Ed. 1314.

Respectfully submitted,

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By James A. McLaughlin,
Attorneys for Appellants.